DUBBIN & KRAVETZ LLP

SAMUEL J. DUBBIN, P.A.
DIRECT (305) 357-9004
sdubbin@dubbinkravetz.com

February 1, 2006

VIA REGULAR MAIL AND FAX

Mr. Samuel Issacharoff
New York University
40 Washington Square South
New York, New York 10012

Re *In re Holocaust Victim Assets Litigation*
Civ. 96-4849 (ERK)

Dear Mr. Issacharaoff:

Thank you for sending me Mr. Neuborne's original filing. I received your January 20, 2006 letter to Judge Korman this past Monday, and wanted to note the following.

First, notwithstanding your citation to *Hensley*, FRCP 23(h)(1)) requires any claim for attorneys fees to be "directed to class members in a reasonable manner." The Advisory Committee Notes to the 2003 amendments state, regarding Rule 23(h)(1): "Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances." To date, this rule has not been satisfied.

Further, considering the notice requirement in subsection (1) and the right of class members to object in subsection (2), a February 3, 2006 cutoff for opposing filings is premature. *See* Committee Notes to Rule 23(h)(2).

Finally, for the reasons stated in Bob Swift's Declaration of December 29, 2005, we are asking for you to supply Mr. Neuborne's time records from other engagements for the time period that overlaps with his request in this case, such as the German Slave Labor/German Foundation litigation, the McCain-Feingold Campaign Finance law litigation, and other consulting and academic commitments. *See* Committee Notes to Rule 23(h)(2).

Mr. Swift and I would like to arrange a conference call with you at your earliest convenience to discuss these matters.

Sincerely,

Samuel J. Dubbin, P.A.

Samuel J. Dubbin, P.A.

cc: Chief Judge Edward R. Korman
Robert Swift, Esquire

Sam Dubbin

From: Samuel Issacharoff [issacharoff@juris.law.nyu.edu]
Sent: Friday, February 10, 2006 1:59 PM
To: Sam Dubbin; rswift@kohnswift.com
Subject: Further information

Please accept this e-mail as a response to factual questions raised during our conference call and in Sam Dubbin's letter of February 9, 2006.

1) The total number of hours worked by Burt Neuborne on the German cases in 2000 is 627.

2) There are no documents, transcripts or writings on conversations referenced in the Dubbin letter of 2/9/06. We do not have any record of when such conversation(s) occurred, only that these comments arose during the innumerable interactions between Mr. Neuborne and the Court.

I believe this satisfies all the requests for information outstanding.

Samuel Issacharoff
Reiss Professor of Constitutional Law
NYU School of Law
40 Washington Square South
New York, N.Y. 10012
(212) 998-6580
Fax: 212-995-4590
e-mail: si13@nyu.edu

DUBBIN & KRAVETZ LLP

SAMUEL J. DUBBIN, P.A.
DIRECT (305) 357-9004
sdubbin@dubbinkravetz.com

February 9, 2006

VIA REGULAR MAIL AND FAX

Mr. Samuel Issacharoff
New York University Law School
40 Washington Square South
New York, New York 10012

Re *In re Holocaust Victim Assets Litigation*
Civ. 96-4849 (ERK)

Dear Mr. Issacharaoff:

In connection with Burt Neuborne's Fee Petition, I am writing for clarification regarding Mr. Neuborne's and the Court's alleged understanding about his compensation for services as Lead Plaintiffs Settlement Counsel.

His initial Declaration begins with the statement that "the Court has determined that Lead Settlement Counsel should be compensated at the conclusion of his service on a lodestar basis on the same terms and conditions as a Special Master." His Supplemental Declaration states "Chief Judge Korman's initial request that I serve as Lead Settlement Counsel was accompanied by an assurance that I would be eligible for hourly lodestar compensation on the same terms and conditions as a Special Master. I explicitly accepted the Court's financial terms."

Are there any details you can supply regarding the exchange? On what date did it occur? Was it memorialized in writing? Was it transcribed? Were any other witnesses present at the time?

I look forward to your response.

Sincerely,

Samuel J. Dubbin, P.A.

Samuel J. Dubbin, P.A.

DUBBIN & KRAVETZ LLP

SAMUEL J. DUBBIN, P.A.
DIRECT (305) 357-9004
sdubbin@dubbinkravetz.com

February 17, 2006

VIA REGULAR MAIL AND FAX

Mr. Samuel Issacharoff
New York University
40 Washington Square South
New York, New York 10012

Re *In re Holocaust Victim Assets Litigation*
Civ. 96-4849 (ERK)

Dear Mr. Issacharaoff:

Although I understand your position to be that Mr. Neuborne need only supply his total number of hours for the year 2000, we are requesting any declarations he filed with the German Foundation fee arbitrators, and his daily time records for 1999 and 2000 (and 2001 if any); i.e. time periods overlapping with this fee request.

We believe these are discoverable. *See* Supplemental Objections, February 17, 2006 and Advisory Committee Notes to 2003 Amendments to FRCP 23(h).

Sincerely,

Samuel J. Dubbin, P.A.

cc: Chief Judge Edward R. Korman
Robert Swift, Esquire

701 BRICKELL AVENUE • 16TH FLOOR • MIAMI, FLORIDA 33131-2847
TELEPHONE (305) 357-9036 • FAX (305) 371-4701

Sam Dubbin

From: Samuel Issacharoff [issacharoff@juris.law.nyu.edu]
Sent: Wednesday, February 22, 2006 3:10 PM
To: Sam Dubbin
Cc: rswift@kohnswift.com
Subject: Re: Feb. 17 letter

Mr. Dubbin:

I continue to be at a loss as to your manner of practicing law. You apologise for my misunderstanding that a letter containing a cc to the Court was not in fact filed with the Court. But then you proceed to submit that same letter to the Court the same day as not one but two separate exhibits to your filing of Feb. 17, 2006. What's more, your exhibit one contains a copy of your February 17, 2006 letter with the date removed and backdated to February 1, 2006. I am simply at a loss for what you are doing.

Let me be clear as to our correspondence and telephone communication. I informed you on the telephone that Mr. Neuborne does not have any time records of any litigation during the period in question for any cases other than the present matter and the German Foundation litigation. There are no other records kept that pertain to billing for litigation. I cannot produce that which does not exist, even if I were so inclined. I will not produce his personal records of gatherings with family, friends, doctors, dentists, etc. I understand from your e-mail below that you agree that these are improper areas of discovery. Nor will I produce records of how he spent his time when not working on this matter. I do not know of any authority for discovery on this score and you have provided none.

You now urge that the German Foundation arbitration records may be necessary to see if the arbitrators somehow already compensated Mr. Neuborne for his work in this case. I continue to object to the discovery of materials outside the scope of this litigation, particularly so when it is subject to a confidentiality agreement. You do however raise the possibility that the arbitrators in the German Foundation matter may have thought they were compensating Mr. Neuborne for the Swiss litigation. Without waiving the privilege against production or my objection to the relevancy of this request, I will reproduce for you the entirety of the discussion of compensation for the Swiss bank matter in the German Foundation litigation. In the application itself, filed November 8, 2000, footnote three states:

"I declined to seek fees in connection with achieving a settlement in the Swiss Bank cases for personal reasons. I plan to seek modest hourly compensation for my post-settlement activities as court-appointed lead settlement counsel."

In the schedule of time charges to the same document, footnote one states:

"The time charges reflected in this document are for activities in connection with the litigation and negotiations that culminated in the establishment of the Foundation. I have not included any time attributable to the Swiss bank litigation. When significant travel is involved, I have attempted to subtract pure travel time so as to bill only for time actually expended in the performance of legal tasks. Finally, I have made no effort to bill for the enormous expenditure of time in connection with efforts to respond to individual inquries from Holocaust victims about the pending litigation, or their right to receive funds from the Foundation or the Swiss settlement fund. As a matter of general practice, I set aside several hous a week to speak to individual Holocuast victims."

Those footnotes are produced in their entirety. I trust that this satisfies your concern about the arbitrators mistakenly assuming they were compensating Mr. Neuborne for the Swiss banks litigation.

Finally, I notice that your First Supplement Objections, which I received only today, carry a request that Mr. Neuborne's fee application be posted on the Court's website. I am not sure if you had the opportunity to check the website prior to filing, but the application is indeed on the website.

Sam Issacharoff

Samuel Issacharoff
Reiss Professor of Constitutional Law
NYU School of Law
40 Washington Square South
New York, N.Y. 10012
(212) 998-6580
Fax: 212-995-4590
e-mail: si13@nyu.edu

>>> "Sam Dubbin" <sdubbin@dubbinkravetz.com> 2/22/2006 12:14 PM >>>

Mr. Issacharoff,

With respect to my letter of Feb. 17, I apologize for any misunderstanding. The letter does indeed show a copy to the Court but I did not in fact fax that letter to Judge Korman. The "cc" reference was my mistake. I did attach the letter as an exhibit to the Survivors' Supplemental Objections which I filed and served, to explain my clients' position concerning the need for other information.

As for the merits, for the reasons expressed in the US Survivors' Feb. 17 Supplemental Objections, I believe it is appropriate to obtain the information requested in the letter. Mr. Neuborne's declarations to the German Foundation arbitrators may have been confidential for that proceeding but if he referred to his pro bono status in the Swiss case in his declaration supporting his request for compensation from the German arbitrators, that would be relevant to his current fee request.

With respect to other time requested, the advisory committee notes say that discovery is within the court's discretion, and the circumstances here warrant such discovery. For example, in June 2001, in a news report about the German Foundation fees, Mr. Neuborne was reported in the New York Times as saying "There wasn't a day in the last four years that I haven't worked hard on this case." Those four years would have overlapped significantly with the periods for which fees are sought here. That, as well as the discrepancies in Mr. Neuborne's Swiss time records such as those noted in my clients' Supplemental Objections, make my request reasonable under the circumstances.

The request does not seek personal information, only time charged to the German case and other professional engagements for time periods overlapping with this request.

Sam Dubbin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: HOLOCAUST VICTIM ASSETS LITIGATION	MASTER DOCKET NO. CV. 96-4849 (ERK) (MDG) (Consolidated with CV-96-5161 and CV-97-461

DECLARATION OF SAMUEL J. DUBBIN

1. My name is Samuel J. Dubbin, and I am over eighteen years of age. This Declaration is based on my personal knowledge and is made under penalty of perjury under the laws of the United States.

2. On September 22, 2003, I attended a Conference held at Queensboro Community College in the New York City area which dealt with Holocaust restitution and litigation. I was invited and attended as a participant on one of the panels due to my work representing individual survivors and heirs, as well as survivor groups such as the Holocaust Survivors Foundation USA, Inc., in restitution related litigation and advocacy. The audience consisted primarily of survivors, children of survivors, and students. I attended the entire conference that day. The audience included may who were critical of many aspects of the restitution process and who expressed their criticisms at the conference.

3. The keynote Speaker was Alan Hevesi, the former New York City official who had been instrumental in the original efforts to remove City business from Swiss banks due to questions about their handling of Jews' money during and after World War II. Other participants in the forum included Gideon Taylor, Executive Vice

President of the Conference on Jewish Material Claims Against Germany, Inc. ("Claims Conference"); Professor Michael Bazyler, of Whittier Law School; Monica Dugas, an attorney who worked for the New York State Banking Office assisting Holocaust victims and heirs with looted art claims; Eva Fogelman, a child of survivors who is also a psychologist well-known in the Holocaust survivor community for her work with survivors and second generation patients, and Martin Stern, an individual who resides in Israel and Great Britain, whose family initiated some of the earlier litigation against Assicurazioni Generali, S.p.A, and recovered a settlement in the process. There were other participants who I cannot recall.

4. Burt Neuborne, Esquire, was scheduled to appear at the forum. However, after lunch the forum organizer announced to the participants that Mr. Neuborne called and said he would not in fact be attending. Indeed, Mr. Neuborne did not speak at the Queensboro forum that day.

DATED: February 17, 2006
Miami, Florida

Samuel J. Dubbin

Professor of Law Mr. Burt Neuborne, **January 29,2006**
New York University School of Law
40 Washington Square
New York, N. Y. 10012-1099

Dear Mr. Neuborne,

David Mermelstein, Alex Moskovic and Jack Rubin survivors, read the article from the Forward by Nathaniel Popper dated January 13, 2006. The article stated that you have filed an application for fees on December 19, 2005 requesting $4.1 million for 8,178 hours of work since 1999 for the Swiss Bank Settlements.

On September 26, 2005 the three of us were at the Miami Court House as witnesses testifying on the final day of the settlement on the Hungarian Gold Train issue. We listened to your dialogue with Judge Seitz; Mr. Neuborne:" but I would like the record to reflect that I initially- I served without a fee in the Swiss case. I am the lead settlement counsel in the Swiss case, in which I served without a fee now almost seven years. That is 1.2 billion dollar recovery. I was the principal lawyer who put the class together, the theories together, I argued the case, participated in the negotiations, and lead settlement counsel, and received no fees in that case at all."

What made you change your mind between September 26,2005 and December 19, 2005 when you filed the application?

We had no idea that you ceased working pro bono after the settlement of the fund, and if you did why wasn't it disclosed during your dialogue with Judge Seitz on September 26, 2005?

Mr. Neuborne, you as the lead settlement counsel in the Swiss case, who has gained respect and prominence for refusing to take any fees, had a change of heart, we the survivors would like a detailed explanation, as to why? It seems unconscionable to renege on your promise.

The survivors of the Shoah deserve to know why.

Respectfully,

David Mermelstein,
Alex Moskovic,
Jack Rubin

New York University
A private university in the public service

School of Law

40 Washington Square South, Room 307
New York, New York 10012-1099
Telephone: (212) 998-6172
Fax: (212) 995-4341
Email: burt.neuborne@nyu.edu

Burt Neuborne
Inez Milholland Professor of Civil Liberties
Legal Director, Brennan Center for Justice

February 17, 2005

Mr. Alex Moskovic
7529 SE, Bay Cedar Circle
Hobe Sound, FL 33455

Dear Mr. Moskovic:

In response to your query, you apparently misunderstood my remarks to the Miami Court. We were talking about fees for obtaining the settlement. I was comparing my *pro bono* work in achieving the Swiss bank settlement with counsel's request for 14% of the Hungarian Gold Train settlement as a fee for obtaining the settlement. I never intended to suggest that I was serving as Lead Settlement Counsel without fee. If my remarks were garbled, I apologize for the confusion.

It is true that I waived fees of many millions of dollars for achieving the Swiss bank settlement. I remain proud of that fact. But, from the date of my appointment in April, 1999 as Lead Settlement Counsel, it was understood by Judge Korman and by my co-counsel that no one could be expected to serve for many years as Lead Settlement Counsel without reasonable compensation. My intensive legal work for the class not only made possible the successful administration of the settlement, which has now distributed almost $840 million to victims, it actually added more than $50 million to the settlement fund. I am asking for 7% of the additional funds that my work added to the settlement fund. I am curious about why you had no objection to a fee of 14% in the Hungarian Gold Train case.

I wish you and your colleagues well. As leaders of the movement for Holocaust reparations, and as survivors who have had the remarkable courage to re-build your lives despite the Nazis, you deserve the respect and admiration of my generation. I am genuinely sorry that you are disappointed in my decision to ask for a reasonable fee for seven years of intensive effort as Lead Settlement Counsel.

Sincerely yours,

Burt Neuborne

Professor of Law Mr. Burt Neuborne
New York University School of Law
40 Washington Square South, Room 307
New York, N.Y. 10012-1099

March 7, 2006

Dear Professor Neuborne,

This is a reply to your letter dated February 17, 2006. I did not misunderstand your remarks on September 26, 2005 at the Miami Court House. David Mermelstein, Jack Rubin and others heard the same dialogue as I did. During the phone conferences with the survivors I was told you said that you were working pro-bono on the Swiss Bank Settlements. Is this also a misunderstanding?

Professor Neuborne you keep bringing up percentages of fees that you are asking for compared to other attorneys. As Judge Seitz said " percentages do not pay our bills". When I, as a victim who work pro bono on the Advisory Committee for Jewish Family Services in Palm Beach County in Florida, look at a fee of $4 million, here's what I see: " home care for a needy victim is $13.00 per hour, for an average of eight hours per week = 13x 8hours equals to $104.00; multiply this by 52 weeks equals to $5408 per year, now lets divide this amount into $4 million that equals 740, to me it means that 740 victims can receive home care for a year. Perhaps you should come down to one of our meetings and see for yourself what is happening in the trenches, you will see our concern.

I have been involved in the Hungarian Gold Train case since 2001, by going to the hearings in Miami (I live a hundred miles from Miami each way and do not receive any compensation for mileage) and was in consultation with Mr. Dubbin , Mr. Cuneo and Mr.Walton till the fruition of the settlement. During this period I became aware of the hours and devotion given by the three sets of attorneys in this case. Therefore I did not look at the percentages, my consideration was the hours spent by all the attorneys and the involvement of the small group of Hungarian victims, and the final outcome of the settlement where the numbers were not as great as your settlements. However, I did not see you or any other attorneys willing to be involved in the Hungarian Gold Train Case. Perhaps you felt that there was no chance of getting any settlements from the U.S. government for the looting the U.S. Army did to the Hungarian Victims' possessions on the 24 train cars. Now that the attorneys in the Hungarian Gold Train case were successful you were there to criticize the fees and on the final day of the hearing, you showed up in Miami representing 13 victims who live in Hungary (out of a total of 62,000 plaintiffs) you did not even know their names when you were asked. Then you asked for victims in Hungary for an additional 10% of the funds that was allocated to the Hungarian victims in the U.S.A. and Israel. I call this type of behavior "chutzpah".

I'm not against an attorney earning a living, if the fees are agreed upon up-front and disclosed and not kept secret till years later. Why the deception? What I and other survivors are against is a $700.00 hourly rate when a large portion of this work could have been done by others whose rate for this type of work is substantially less. This exorbitant rate is unconscionable. And, while you were charging those rates to the "entire class," what were you actually doing to assist the poor Looted Asset class members in the U.S., Israel, and elsewhere outside the FSU?

I also resent any individual of patronizing all the survivors for having remarkable courage for re-building our lives after the Shoah despite the loss of our families. Yes we deserve the respect and the admiration of your generation, and after sixty years we should be treated with dignity, understanding, equality, and not by being charged exorbitant undeserved attorney fees and unrealistic administrative fees.

At the meeting on January 20 ,2006 with Judge Korman and Judah Gribetz, the survivors present asked for an accounting of the administrative fees for the Swiss Bank Settlements . Now here we are into March and we were promised but have not yet received the above requested accounting. Action speaks louder than empty promises.

Sincerely,

Alex Moskovic, a' Last Generation Survivor'

7529 SE Bay Cedar Circle
Hobe Sound , Fl. 33455

cc: Judge Edward R. Korman

Professor of Law Mr. Burt Neuborne
New York University School of Law
40 Washington Square South, Room 307
New York, N.Y. 10012-1099

March 6, 2006

Dear Professor Neuborne,

This is a reply to your letter dated February 17, 2006. I did not misunderstand your remarks on September 26, 2005 at the Miami Court House. David Mermelstein, Jack Rubin and others heard the same dialogue as I did. During the phone conferences with the survivors I was told you said that you were working pro-bono on the Swiss Bank Settlements. Is this also a misunderstanding? Representing the entire class, how did your action benefit the Looted Asset Class to receive a fair share?

Professor Neuborne you keep bringing up percentages of fees that you are asking for compared to other attorneys. As Judge Seitz said " percentages do not pay our bills". When I, as a victim who works pro bono on the Advisory Committee for Jewish Family Services in Palm Beach County in Florida, look at a fee of $4 million, here's what I see: " home care for a needy victim is $13.00 per hour, for an average of eight hours per week = 13x 8hours equals to $104.00; multiply this by 52 weeks equals to $5408 per year, now lets divide this amount into $4 million that equals 740, to me it means that 740 victims can receive home care for a year. Perhaps you should come down to one of our meetings and see for yourself what is happening in the trenches, you will see our concern.

I have been involved in the Hungarian Gold Train case since 2001, by going to the hearings in Miami (I live a hundred miles from Miami each way and do not receive any compensation for mileage) and was in consultation with Mr. Dubbin , Mr. Cuneo and Mr.Berman till the fruition of the settlement. During this period I became aware of the hours and devotion given by the three sets of attorneys in this case. Therefore I did not look at the percentages, my consideration was the hours spent by all the attorneys and the involvement of the small group of Hungarian victims, and the final outcome of the settlement where the numbers were not as great as your settlements. However, I did not see you or any other attorneys willing to be involved in the Hungarian Gold Train Case. Perhaps you felt that there was no chance of getting any settlements from the U.S. government for the looting the U.S. Army did to the Hungarian Victims' possessions on the 24 train cars. Now that the attorneys in the Hungarian Gold Train case were successful you were there to criticize the fees and on the final day of the hearing, you showed up in Miami representing 13 victims who live in Hungary (out of a total of 62,000 plaintiffs) you did not even know their names when you were asked. Then you asked for victims in

Hungary for an additional 10% of the funds that was allocated to the Hungarian victims in the U.S.A. and Israel. I call this type of behavior "chutzpah".

I'm not against an attorney earning a living, if the fees are agreed upon up-front and disclosed and not kept secret till years later. Why the deception? What I and other survivors are against is a $700.00 hourly rate when a large portion of this work could have been done by others whose rate for this type of work is substantially less. This exorbitant rate is unconscionable.

I also resent you and others of patronizing all the survivors by having remarkable courage for re-building our lives after the Shoah despite the loss of our families . Yes we deserve the respect and the admiration of your generation, and after sixty years we should be treated with dignity, understanding, equality, and not by being charged exorbitant undeserved attorney fees and unrealistic administrative fees. At the meeting on January 20 ,2006 with Judge Korman and Judah Gribetz, the survivors present asked for an accounting of the administrative fees for the Swiss Bank Settlements . Now here we are into March and we were promised but have not yet received the above requested accounting. Action speaks louder than empty promises.

Sincerely,

Alex Moskovic, a' Last Generation Survivor'

7529 SE Bay Cedar Circle
Hobe Sound , Fl. 33455

FILING INSTRUCTIONS

XX 12-15-05

How To Manage Your Law Office

Publication 356 Release 32 November 2005

Check As Done

- ☐ 1. Check the Title page in the front of your present Volume 1. It should indicate that your set is filed through Release Number 31. If the set is current, proceed with the filing of this release. If your set is not filed through Release Number 31, DO NOT file this release. Please call Customer Services at 1-800-833-9844 for assistance in bringing your set up to date.
- ☐ 2. This Release Number 32 contains only White Revision pages.
- ☐ 3. Circulate the "Publication Update" among those individuals interested in the contents of this release.

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*

For faster and easier filing, all references are to right-hand pages only.

VOLUME 1

Revision

☐	Title page thru xxv	Title page thru xix
☐	4-1 thru 4-15	4-1 thru 4-16.1
☐	4-65 thru 4-73	4-65 thru 4-93
☐	5-7 thru 5-45	5-7 thru 5-46.1
☐	5A-1 thru 6A-37	5A-1 thru 6A-21
☐	6B-1 thru 6B-19	Material not replaced
☐	7-1 thru 7-25	7-1 thru 7-25

VOLUME 2

Revision

☐	Title page thru xiii	Title page thru vii
☐	App B2-1 thru App B3-3	App B2-1 thru App B3-3
☐	App E-1 thru App E-7	App E-1 thru App E-7
☐	I-1 thru I-31	I-1 thru I-31

STATE BY YEARS OF LEGAL EXPERIENCE
STANDARD HOURLY BILLING RATES
As of January 1, 2005

State/Years of Experience		Number of Offices	RATE					
			Number of Lawyers	Average $	Lower Quartile $	Median $	Upper Quartile $	Ninth Decile $
NY	Under 2 Years	16	60	163	131	160	190	213
	2 or 3 Years	14	51	198	165	195	230	240
	4 or 5 Years	13	37	206	175	195	225	270
	6 or 7 Years	16	45	222	183	225	250	285
	8 to 10 Years	17	53	247	210	235	275	335
	11 to 15 Years	19	79	257	220	245	295	350
	16 to 20 Years	18	72	289	235	275	350	423
	21 to 30 Years	20	146	322	250	300	350	475
	31 or More Years	18	74	333	260	350	360	490
OH	Under 2 Years	24	119	147	135	145	155	175
	2 or 3 Years	25	140	166	150	165	180	190
	4 or 5 Years	27	129	181	160	185	200	215
	6 or 7 Years	28	123	189	170	190	215	228
	8 to 10 Years	25	164	208	185	215	235	280
	11 to 15 Years	27	167	240	210	245	275	300
	16 to 20 Years	26	142	265	235	275	305	329
	21 to 30 Years	29	288	289	250	295	328	360
	31 or More Years	24	153	294	255	300	340	380
OK	Under 2 Years	6	14	148	--	160	--	--
	2 or 3 Years	8	17	159	143	165	175	185
	4 or 5 Years	7	14	177	--	178	--	--
	6 or 7 Years	6	14	159	--	173	--	--
	8 to 10 Years	6	15	194	--	195	--	--
	11 to 15 Years	7	18	204	171	210	230	253
	16 to 20 Years	7	29	218	208	225	240	250
	21 to 30 Years	9	49	246	215	245	280	325
	31 or More Years	8	23	258	181	250	305	365

(continued on next page)

POPULATION SIZE
STANDARD HOURLY BILLING RATES
As of January 1, 2005

Population Size/Status		Number of Offices	Number of Lawyers	RATE: Average $	RATE: Lower Quartile $	RATE: Median $	RATE: Upper Quartile $	RATE: Ninth Decile $
Less than 250,000	Equity Partner/Shareholder	100	630	229	190	225	265	315
	Non-Equity Partner	48	134	227	194	220	250	308
	Associate/Staff Lawyer	95	445	163	135	160	188	210
250,000 - 999,999	Equity Partner/Shareholder	215	2,572	259	215	250	300	350
	Non-Equity Partner	110	426	238	205	240	270	305
	Associate/Staff Lawyer	202	1,892	174	143	170	195	230
1 Million or More	Equity Partner/Shareholder	275	3,869	313	260	305	360	425
	Non-Equity Partner	203	1,266	272	216	270	320	375
	Associate/Staff Lawyer	292	4,548	197	155	190	225	275

INDIVIDUAL LITIGATION SPECIALTIES
STANDARD HOURLY BILLING RATES
As of January 1, 2005

Specialty/Status		Number of Offices	RATE Number of Lawyers	Average $	Lower Quartile $	Median $	Upper Quartile $	Ninth Decile $
Other Litigation	Partner/Shareholder-Equity/Non-Equity	94	271	261	213	260	300	340
	Associate/Staff Lawyer	71	265	182	145	180	205	232
Multiple Litigation	Partner/Shareholder-Equity/Non-Equity	272	1,384	294	225	280	340	450
	Associate/Staff Lawyer	243	1,329	197	155	185	225	275

THE 2004 DESKTOP REFERENCE ON THE ECONOMICS OF LAW PRACTICE IN NEW YORK STATE

Benchmarks and Referents for Law Practice Management

Survey Conducted by:
Spectrum Associates Market Research
Farmington, CT

Figure F7
Average Attorney Billing Rates
For Law Firm Equity and Non-Equity Partners by Size of Law Firm

			Base	Percentile 25	Median	Percentile 75	Percentile 95	Mean
Equity Partners	Region	Solo	104	$210	**$250**	$300	$375	$261
		2 - 9	64	$250	**$300**	$350	$450	$307
		10 - 34	14	$280	**$343**	$395	$550	$331
		35+	8	$338	**$436**	$487	$512	$405
		Total	190	$225	**$250**	$300	$400	$268
	NY Totals	Solo	449	$175	**$230**	$275	$350	$233
		2 - 9	271	$175	**$250**	$320	$400	$251
		10 - 34	56	$175	**$270**	$335	$400	$268
		35+	15	$300	**$385**	$473	$512	$370
		Total	791	$175	**$240**	$295	$375	$236
Non-Equity Partners	Region	Solo	-	-	-	-	-	-
		2 - 9	21	$175	**$250**	$275	$475	$246
		10 - 34	12	$191	**$275**	$363	$395	$271
		35+	6	$300	**$375**	$425	$460	$352
		Total	39	$180	**$250**	$330	$475	$262
	NY Totals	Solo	-	-	-	-	-	-
		2 - 9	106	$150	**$175**	$250	$350	$202
		10 - 34	41	$150	**$220**	$300	$375	$231
		35+	11	$250	**$374**	$425	$460	$334
		Total	158	$150	**$200**	$250	$375	$213

Figure F8
Average Attorney Billing Rates
For Non-Partner Attorneys by Size of Law Firm and Experience

			Base	Percentile 25	**Median**	Percentile 75	Percentile 95	Mean
10 + Years Experience	**Region**	2 - 9	40	$250	**$300**	$325	$395	$290
		10 - 34	15	$225	**$325**	$360	$400	$295
		35+	8	$243	**$300**	$380	$395	$298
		Total	63	$250	**$300**	$350	$395	$292
	NY Totals	2 - 9	186	$175	**$250**	$300	$350	$241
		10 - 34	49	$175	**$250**	$325	$395	$257
		35+	15	$225	**$300**	$373	$395	$278
		Total	250	$175	**$250**	$300	$375	$244
5 - 9 Years Experience	**Region**	2 - 9	36	$175	**$245**	$250	$315	$228
		10 - 34	13	$185	**$250**	$275	$290	$230
		35+	9	$225	**$250**	$285	$309	$244
		Total	58	$175	**$250**	$270	$309	$230
	NY Totals	2 - 9	120	$150	**$200**	$250	$300	$201
		10 - 34	53	$150	**$185**	$250	$285	$198
		35+	16	$175	**$245**	$285	$309	$231
		Total	189	$150	**$200**	$250	$300	$203
1 - 4 Years Experience	**Region**	2 - 9	30	$160	**$175**	$200	$250	$182
		10 - 34	15	$165	**$190**	$225	$230	$186
		35+	9	$165	**$196**	$215	$236	$192
		Total	54	$160	**$175**	$200	$250	$184
	NY Totals	2 - 9	128	$125	**$150**	$190	$250	$163
		10 - 34	57	$125	**$160**	$195	$230	$161
		35+	16	$160	**$194**	$215	$236	$183
		Total	201	$125	**$160**	$200	$250	$164
< 1 Year Experience	**Region**	2 - 9	9	$125	**$130**	$175	$200	$142
		10 - 34	8	$125	**$135**	$160	$215	$143
		35+	5	$145	**$145**	$160	$165	$151
		Total	22	$125	**$140**	$170	$200	$144
	NY Totals	2 - 9	42	$100	**$130**	$160	$200	$133
		10 - 34	40	$100	**$125**	$135	$215	$125
		35+	11	$140	**$145**	$160	$165	$140
		Total	93	$100	**$130**	$150	$200	$131

2005 Law Firm Financial Benchmarking Survey

Survey Background

- Administered to firms nationwide.
- All data submitted for use in this survey are kept completely confidential.
- 'Attorneys' refers to all attorneys/lawyers, including equity partners, non-equity partners and associates. Paralegals are excluded from this category.
- 'Administrative' refers to all support functions, excluding paralegals.
- Data for 2002, 2001 and 2000 represents responses from prior editions of the survey.

Respondent Breakdown

- Respondent information was broken into the categories below based for analysis.
- Northeast respondent data (36 firms)
  - <151 attorneys = 25
  - 151+ attorneys = 11
- Other Northeast Demographics:
  - Multi-office = 28
  - Single-office = 8
  - General practice = 27
  - Specialty practice= 9

Respondent Breakdown

- Respondent information was broken into the categories below based for analysis.
- National respondent data (209 firms)
  - <50 attorneys = 94
  - 51-150 attorneys = 70
  - 151+ attorneys = 45
- Office Type:
  - Multi-office = 134
  - Single-office = 75

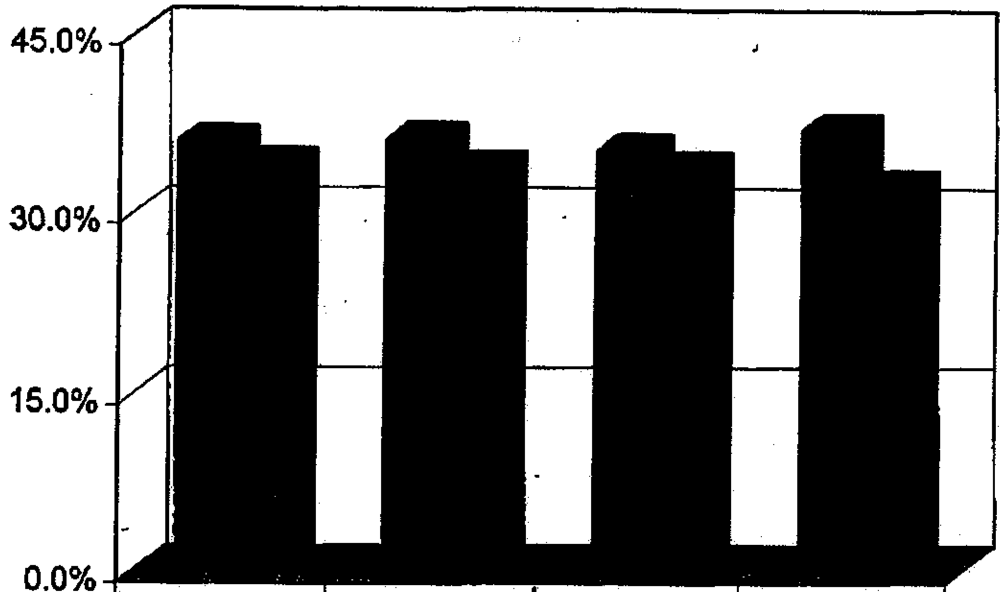
Respondent Breakdown

- Practice Type
  - General = 149
  - Specialty = 60
- Specialty:
  - Insurance Defense = 11
  - Intellectual Property/Patent = 11
  - All Other Specialties = 38

Survey Demographics

- Regional Breakdown
  - West (AK, AZ, CA, CO, HI, ID, MT, NM, NV, OR, UT, WA, WY) = 24
  - Midwest (IA, IL, IN, KS, ND, MI, MN, MO, NB, NE, OH, SD, WI) = 104
  - South = (AL, AR, FL, GA, KY, LA, MS, NC, OK, SC, TN, TX) = 28
  - Mid-Atlantic (DC, DE, MD, VA, WV) = 17
  - Northeast (CT, MA, ME, NH, NJ, NY, PA, RI, VT) = 36
- Largest Obstacles for Firms
  - Increase revenue
  - Improve profitability
  - Succession planning

Net Income as a % Fees Collected



	2004	2003	2002	2001
Northeast - <151 Attorneys	36.2%	36.4%	35.4%	37.2%
Northeast - 151+ Attorneys	34.4%	34.0%	34.1%	32.5%

Net Income as a % Fees Collected

		2004	2003	2002	2001
National - All		38.8%	38.7%	38.5%	38.2%
Regional	West	35.7%	35.8%	35.2%	32.9%
	Midwest	38.4%	38.0%	37.8%	37.2%
	South	42.1%	41.7%	41.4%	41.1%
	Mid-Atlantic	42.9%	41.9%	39.5%	41.0%
	Northeast	35.8%	35.6%	34.8%	35.9%
Firm Size	<50 Attorneys	39.2%	39.3%	39.2%	39.2%
	50-150 Attorneys	37.4%	37.6%	37.7%	37.2%
	151+ Attorneys	36.7%	36.4%	35.5%	35.0%
Practice Type	General	39.0%	39.0%	38.3%	38.0%
	Specialty	38.8%	38.5%	38.9%	39.5%
Specialty	Insur. Defense	35.0%	32.7%	36.5%	30.4%
	IP	28.0%	28.1%	31.9%	29.6%

FACSIMILE TRANSMISSION

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20544

Date: 3-15-06

To: Sam Dubbin

Fax No.: 305-371-4701

From: Bob Deyling

Fax. No.: 202-502-1033 Tele. No.: 202-502-1100

NUMBER OF PAGES WITH COVER: 16

Message: Regulations as we discussed.

See Section 3 E

THIS FACSIMILE MESSAGE IS CONFIDENTIAL AND MAY CONTAIN ATTORNEY-CLIENT, WORK PRODUCT OR OTHER PRIVILEGED COMMUNICATIONS OR INFORMATION INTENDED ONLY FOR THE RECIPIENT NAMED ABOVE.

Chapter 1
Chapter 2
Chapter 3
Chapter 4
Chapter 5
Chapter 6
Chapter 7
Chapter 8
Chapter 9
Chapter 10
Chapter 11
- Part A
- Part B
- Part C
- Part D
- Part E
- Part F
- Part G
Chapter 12

CHAPTER 11: CLAIMS

Part D. Regulations Governing Legal Representation at Government Expense of Judges of the United States and Court Officials and Employees Sued in Their Official Capacities or on Account of Their Performance of Official Duties.

CONTENTS

1. General Information.

A. Statement of Purpose.
B. Statutory Authority.
C. Application.
D. Issuance and Amendment Procedures.
E. Critical Incidents.

2 Procedure Upon Service of Process.

A. Judges or Judicial Officers.
B. Judicial Employees.
C. Administrative Office Procedure.
D. Department of Justice Procedure.
E. Mandamus Actions.
F. Federal Public Defenders.
G. Critical Incidents.

3. Compensation of Private Counsel by Government.

A. In General.
B. Availability of Funds.
C. Collateral or Mandamus Proceedings.
D. Selection of Private Counsel.
E. Maximum Hourly Fees.
F. Allowable Expenses.
G. Critical Incidents.

4. Billing and Payment Procedures.

A. Frequency of Payment.
B. Submission of Bill.
C. Approval for Payment.
D. Disbursement by Administrative Office.

5. Indemnification.

Exhibits:
D-1 Decision Letter of the Comptroller General of the United States (No. B-178360, Oct. 31, 1973).
D-2 Personal Request By Officer or Employee of the Federal Judiciary for LegalRepresentation.
D-3 Supervisor's Certification That Employee Was Acting in Official Capacity.

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1. General Information

A. Statement of Purpose.

The following regulations are issued pursuant to the authority accorded to the Director of the Administrative Office of the United States Courts by section 463 of title 28, United States Code (as added by section 116 of the Federal Courts Improvement Act of 1982, Public Law No. 97-164, 96 Stat. 25, 32, effective on October 1 1982).

B. Statutory Authority.

It is provided by 28 U.S.C. § 463 that the Director may pay the costs of legal defense for justices and judges of the United States and other officers and employees of the courts of the United States who are sued in the judicial or official capacity, or are otherwise required to defend actions taken or omissions occurring in such capacity, when the services of an attorney for the government are not reasonably available for this purpose through the resources of the Department of Justice or the United States Attorney for the applicable judicial district. It is further required by section 463 that the Director shall prescribe regulations for such payments, subject to the approval of the Judicial Conference of the United States.

C. Application.

These regulations apply to situations of Federal or state court litigation naming as defendants, in their respective judicial or official capacities, or in their individual capacities on account of the performance of their official duties, judges, officers, and employees of the courts of the United States, including, but not limited to, the following: (1) judges of the United States (as defined at 28 U.S.C. § 451), judges of the United States Court of Federal Claims, United States bankruptcy judges, United States magistrate judges, and judges of territorial courts; (2) law clerks and other staff assigned directly to judges enumerated in subsection (1) above; (3) clerks, deputy clerks, probation officers, court reporters, and staff of the United States court of appeals, the United States district courts the United States bankruptcy courts, the United States Court of International Trade, the United States Court of Federal Claims, and the territorial courts; (4) circuit executives and their staff, and (5) Federal Public Defenders and their staff. The above does not necessarily constitute a complete and exhaustive list of the situations in which the Director may have authority to pay the costs of legal defense.

D. Issuance and Amendment Procedures.

These regulations may be amended or rescinded by the Director, under the authority vested in him through 28 U.S.C. § 604(f), at such times as he may deem necessary in the performance of his duties and with the approval of the Judicial Conference.

E. Critical Incidents.

These regulations shall also apply to the provision of emergency interim legal representation for judicial officers and employees of the United States, including, but not limited to, those listed in section 1C, in the aftermath of a "critical incident," i.e., a shooting or other use of force causing serious bodily injury in which the judge, officer, or employee was involved, or is or may be alleged to have been involved, in the course of the performance of official duties.

2. Procedure Upon Service of Process

A. Judges or Judicial Officers.

A judge or judicial officer, as listed in subsection (1) of section 1C of these regulations, who is served with civil process or who has received notice that a civil action has been filed (or who has a staff member so served or notified) based upon an episode occurring or action taken in the judicial capacity, and who desires legal representation under the auspices of the Department of Justice or otherwise at the expense of the United States, should transmit by mail the summons and complaint or other process served, together with a personally signed cover letter specifying the date and manner of service and explicitly requesting the assumption of legal representation, to the following address:

Office of the General Counsel
Administrative Office of the United States Courts
Suite 7-290
One Columbus Circle, N.E.
Washington, D.C. 20544

A copy of such communication should also be transmitted to the United States Attorney for the judicial district in which the case has been filed. Special note should be made to the United States Attorney of (1) the answering date specified in the summons if it does not conform with Rule 12(a), Federal Rules of Civil Procedure, affording an officer or employee of the United States 60 days to respond to civil process arising from the official capacity, or (2) the fact that the case has been filed in a state or local court, necessitating the prompt commencement of removal proceedings under 28 U.S.C. § 1443.

B. Judicial employees.

A circuit executive, clerk of court, probation officer, or other court official who is served with civil process or who has received notice that a civil action has been filed based upon the exercise of his or her official duties (or who has a staff member so served or notified), and who desires legal representation under the auspices of the Department of Justice or otherwise at the expense of the United States, should transmit the summons and complaint or other process served with individual covering letters signed by all named defendants, in the same manner described in section 2A of these regulations with respect to judges and judicial officers, and should similarly communicate with the United States Attorney in the judicial district where the case is pending.

C. Administrative Office Procedure.

Upon receipt of a request for legal representation submitted in accordance with sections 2A or 2B of these regulations, the Office of the General Counsel in the Administrative Office will promptly transmit such request to the Department of Justice (addressed to the appropriate Branch of the Civil Division), together with a letter from the General Counsel or his designee recommending whether representation should be authorized by the Department. This procedure recognizes the role of the Justice Department under 28 U.S.C. §§ 516-519 as attorney for the United States and its agencies or officers in any litigation to which they are official parties. The recommendation of the General Counsel for the Justice Department on the undertaking of representation is offered in accordance with the regulation of the Department at 28 C.F.R. § 50.15(a), which requires the "employing agency" of an officer or employee of the United States who is sued in that capacity to recommend whether the assumption of representation by the Department of Justice would be in the interest of the Government. The basis for this recommendation by the General Counsel shall be (1) whether the named defendants were acting within the scope of their employment at the time of the acts or events alleged as the basis of the lawsuit, and (2) whether the assumption of representation would otherwise appear to be consistent with the best interests of the United States (including the desirability to assert and uphold any applicable judicial or official immunity available to the defendants as an affirmative defense to the claims asserted).

D. Department of Justice Procedure.

Upon receipt of a communication from the General Counsel of the Administrative Office in accordance with section 2C of these regulations, the Civil Division of the Justice Department will determine under its regulations whether legal representation shall be authorized and will communicate its decision to the appropriate United States Attorney and to the Administrative Office. If representation authority is granted, the Department will normally delegate to the United States Attorney for the applicable judicial district the function to enter an appearance for the defendant and to undertake his or her substantive legal defense pursuant to 28 U.S.C. §§ 519 and 547, although the Department may perform such representation directly where it deems such procedure appropriate.

E. Mandamus Actions.

Where application is made to the United States court of appeals for a writ of mandamus or prohibition directed to a court under Rule 21, Federal Rules of Appellate Procedure, no request for legal representation by the trial-court judge is required unless and until the court of appeals should issue an invitation or order pursuant to Rule 21(b), Federal Rules of Appellate Procedure, that the judge may address the petition. Where the judge believes that the submission of an answer is critical to upholding the judicial act that is the subject of the mandamus petition and that the parties to the underlying lawsuit will not adequately do so, a request for the services of the Department of Justice in submitting such answer may be made to the General Counsel of the Administrative Office in the same manner as provided by sections 2A and 2C of these regulations. Similar principles will apply where application has been made to the Supreme Court of the United States, a United States district court, or any other Federal or state court for a writ of mandamus or prohibition directed to a court or to a judicial officer or employee, except to the extent that in such proceedings it may not be the court's practice to issue an invitation or order of the sort referred to in Rule 21(b)(4), Federal Rules of Appellate Procedure.

F. Federal Public Defenders.

No request for representation of a Federal public defender or his or her staff sued in the official capacity shall normally be submitted to the Department of Justice, in view of the Department's prosecutorial role and its consequent apparent disqualification to represent a public defender against whom it prosecutes criminal cases. Instead, the General Counsel of the Administrative Office, in consultation with its Defender Services Division, shall make alternative arrangements for the legal defense of a public defender and his or her staff by the Federal public defender of another judicial district or, where necessary, by private counsel in accordance with section III of these regulations. Submission to the Department of Justice of a request for representation of a Federal public defender or his or her staff nonetheless may be appropriate where the need for representation does not arise from, or relate to, the public defender's defense of a criminal defendant, and the public defender has requested such submission.

G. Critical Incidents.

A judicial officer or employee of the United States who has been involved, or is or may be alleged to have been involved, in the course of the performance of official duties, in a "critical incident," i.e., a shooting or other use of force causing serious bodily injury, need not await service of process or the filing of a complaint or other legal process in order to request representation. A judicial officer or employee in that position may request representation immediately following the critical incident, in recognition that such an officer or employee may be threatened with civil and/or criminal liability and any action or statement following the incident could affect the officer's or employee's potential civil and/or criminal exposure. The Office of the General Counsel will request representation by the Department of Justice under standards and policies set out in these regulations.

3. Compensation of Private Counsel by Government

A. In General.

Where the Department of Justice communicates its unavailability to represent a judge or other court official, either directly or through the United States Attorney, because of considerations of conflicting interests or for any other reason, the Director of the Administrative

Office shall then consider the exercise of his authority under 28 U.S.C. § 463 to pay the costs of such legal defense by private counsel. The Director shall similarly consider the exercise of such authority, upon receipt of a representation request submitted under section 2A of these regulations, in circumstances where the Justice Department would clearly be placed in a conflict-of-interest position if it were to accept the representation and the submission of a representation request to the Department is thus deemed to be inappropriate.

B. Availability of Funds.

In determining whether to apply the appropriated funds of the Judiciary to the payment of legal representation expenses by private counsel, the Director shall be guided by the decision of the Comptroller General of the United States (No. B-178360, October 31, 1973), published at 53 Comp. Gen. 301 (1973) and attached to these regulations as Exhibit D-1. In this opinion the Comptroller General held that judicial appropriations may be applied to the payment of attorneys' fees and litigation expenses incurred in representing judges and other court officials, where the resources of the Department of Justice are unavailable to do so and where the entry of an appearance for the judicial defendants is found to be necessary to protect their legal interests or to uphold their immunity in an action for personal damages.

Top

C. Collateral or Mandamus Proceedings.

Consistent with the guiding decision of the Comptroller General referenced in section 3B, the appropriated funds of the Judiciary shall not be applied to legal representation in circumstances where the lawsuit in question is not a personal damage action but instead constitutes a collateral attack upon a judicial act or court judgment, which should appropriately be defended by the private party in the underlying litigation to whose benefit the judgement or order at issue has inured. In mandamus proceedings against a court under Rule 21, Federal Rules of Appellate Procedure, judicial appropriations shall not be expended for private legal representation unless the court of appeals has invited or ordered the trial-court judge to address the petition pursuant to Rule 21(b) and the judge finds, with the approval of the Director, that an answer is necessary to apprise the court of appeals regarding the legal considerations surrounding the judicial order or action at issue. Similar principles will apply in mandamus proceedings brought against a court or a judge or judicial employee in the Supreme Court of the United States, a United States district court, or any other Federal or state court, except to the extent that in such proceedings it may not be the court's practice to issue an invitation or order of the sort referred to in Rule 21(b)(4), Federal Rules of Appellate Procedure.

D. Selection of Private Counsel.

Where the Director, or the General Counsel acting on his behalf, finds that legal representation is essential to protect the interests of a judge or other court official, that the resources of the Justice Department are not available to furnish such representation, and that the expense of such representation should properly be borne by the Government under the guiding decision of the Comptroller General, the General Counsel shall so advise the judicial defendant in writing (or by telephone where time constraints so require). The judicial defendant shall be authorized to select and designate private counsel to perform the representation and shall promptly advise the Administrative Office of the name and business address of the attorney so designated. The Administrative Office may require that counsel be selected from the geographical area surrounding the place of holding court where the entry of appearance is anticipated, in order to conserve funds to be expended for the attorney's travel in the course of the representation.

E. Maximum Hourly Fees.

The rate of compensation to be allowed to private counsel from appropriated funds for time devoted to the legal defense of a judge or court official shall be fixed on an hourly basis by the Director, with the advice of the General Counsel, to reflect (1) the overall difficulty of the representation, (2) the proportion of time spent in court appearances, research, and the drafting of pleadings, briefs or memoranda of law, and (3) the complexity of legal issues involved in the lawsuit. In view of the Comptroller General's determination that the expenses of litigation to be defrayed from judicial appropriations shall include only "minimal fee" to private attorneys (page 5 of Exhibit D-1 to these regulations), a maximum hourly rate of compensation to private counsel shall be established by the Director and may be adjusted by him periodically as necessary. This maximum rate shall not exceed the highest rate of compensation currently payable by the Department of Justice to private counsel retained pursuant to its regulations.

F. Allowable Expenses.

Private counsel undertaking the representation of a judge or other court official under 28 U.S.C. § 463 and these regulations shall be entitled, in addition to the payment of fees at an hourly rate established under section 3E hereof, to be reimbursed for reasonable and necessary expenses incident to the representation. Such expenses must be itemized in the attorney's billing and may include, but shall not necessarily be limited to, long-distance telephone calls, photocopying costs, transcript fees, the taking of depositions, and travel expenses necessitated by court appearances or depositions.

G. Critical Incidents.

As stated in section 2G, there will often be a need for immediate representation following a critical incident, since any action or statement following the incident could affect the judicial officer's or employee's potential civil an/or criminal exposure. The Department of Justice has stated that it is unavailable to provide emergency interim representation in these situations, even though ultimately the Department may, after giving the matter due consideration, decide to provide representation. As a result, emergency interim representation of a judicial officer or employee involved in a critical incident will be by private counsel under this section 3. Once the Department of Justice has had an opportunity to consider the representation issue, the Department will assume representation of the judicial officer or employee if that should be the Department's decision.

4. Billing and Payment Procedures

A. Frequency of Payment.

The Administrative Office shall ordinarily make payment to a private attorney for services rendered in judicial representation only at the conclusion of the legal proceedings. Where the proceeding is protracted, disbursement may be made periodically in order to alleviate financial hardship to the attorney. Nevertheless, such periodic disbursement shall be made only upon receipt of the attorney's billing statement and shall not take place more frequently than once per month.

B. Submission of Bill.

Private counsel providing representation covered by these regulations shall submit billings for their services on their usual billing forms. The billing statement shall enumerate the amount of time expended in legal services for which compensation is claimed, the dates on which such services were rendered, and the general nature of the work performed on each date. The hourly rate of compensation upon which the claimed fee is based shall be plainly designated and shall conform with the amount allowed by the Director pursuant to section 3E of these regulations. The billing statement shall also set forth any ancillary expenses of representation for which reimbursement is claimed in conformity with section 3F hereof. The statement shall be submitted to the defendant for whom representation services have been rendered or, where there are several such defendants, to the judge who is senior in commission among the defendants or the ranking court official, where no judge is a defendant.

C. Approval for Payment.

When the judicial defendant receives a bill from private counsel under section 4B of these regulations, he or she shall write a covering letter or endorse on the face of the billing his or her acknowledgment that the services for which compensation is claimed have been rendered in a satisfactory manner. If the defendant (or, where there are several defendants, any or the defendants) is a judge of any court other than the Court of International Trade or the Court of Federal Claims, he or she shall then forward the billing to the chief judge of the circuit with the request that the chief judge manifest his or her approval for the payment of the bill, in view of the Comptroller General's requirement (on page 6 of Exhibit D-1) that the ultimate decision on the degree of representation required and the amount of payment justified should be made by someone other than the defendant or respondent involved in the case. If the defendant is a judge of the Court of International Trade or the Court of Federal Claims, or a court official or judicial employee other than a judge, he or she shall submit the attorney's bill to the chief judge of his or her court with the request for approval thereof.

D. Disbursement by Administrative Office.

Following approval by the chief judge of the circuit or of the defendant's court, the attorney's statement shall be transmitted to the General Counsel of the Administrative Office. The General Counsel and his staff shall review the billing to assure that it conforms with these regulations and with the terms upon which counsel was originally retained. The General Counsel shall then refer the billing to the Office of Finance and Budget, Accounting and Financial Systems Division, for final audit and the disbursement of payment.

5. Indemnification

A. The Administrative Office may indemnify the defendant judiciary officer or employee for any verdict, judgment, or other monetary award which is rendered against such officer or employee, provided that the conduct giving rise to the verdict, judgment, or award was taken within the scope of employment and that such indemnification is in the interest of the United States, as determined by the Director or his or her designee.

B. The Administrative Office may settle or compromise a personal damages claim against a judiciary officer or employee by the payment of available funds at any time, provided the alleged conduct giving rise to the personal damages claim was taken within the scope of employment and that such settlement or compromise is in the interest of the United States, as determined by the Director or his or her designee.

C. Absent exceptional circumstances as determined by the Director or his or her designee, the Administrative Office will not entertain a request either to agree to indemnify or to settle a personal damages claim before entry of an adverse verdict, judgment, or award.

D. To request indemnification to satisfy a verdict, judgment, or award entered against an officer or employee, the officer or employee shall submit a written request, with appropriate documentation including copies of the verdict, judgment, award, or settlement proposal if on appeal, to the General Counsel, who shall thereupon submit the request with a recommended disposition to the Director for decision.

E. Any payment under this section either to indemnify an officer or employee or to settle a personal damages claim shall be contingent upon the existence of adequate appropriated funds available for the operations of the employing court or office. The foregoing regulations are hereby prescribed by authority of 28 U.S.C. § 463 and with the approval of the Judicial Conference at its sessions on September 22 and 23, 1982, September 14, 1988, and March 11 and 12, 1997.

Trans 141 - Last modified by March 29, 2004

Chapter 1
Chapter 2
Chapter 3
Chapter 4
Chapter 5
Chapter 6
Chapter 7
Chapter 8
Chapter 9
Chapter 10
Chapter 11
Chapter 12

PART D: REGULATIONS GOVERNING LEGAL REPRESENTATION AT GOVERNMENT EXPENSE OF JUDGES OF THE UNITED STATES AND COURT OFFICIALS AND EMPLOYEES SUED IN THEIR OFFICIAL CAPACITIES OR ON ACCOUNT OF THEIR PERFORMANCE OF OFFICIAL DUTIES

Exhibit D-1. Decision Letter of the Comptroller General of the United States

B-178360

October 31, 1973

The Honorable Rowland F. Kirks, Director
Administrative Office of the
United States Courts
Dear Mr. Kirks:

Your letter of April 2, 1973, with attachments, requests our decision as to whether appropriations contained in the annual "Judiciary Appropriation Act" for "travel and miscellaneous expenses not otherwise provided for, incurred by the judiciary," are available to pay certain litigation costs, and attorneys fees, incurred in representing or defending Federal judges and other Federal judicial officers or entities in the circumstances considered below. We have had several discussions concerning this matter with members of your staff.

A large, and still growing, number of cases have been brought against individual judges, district courts, and judicial councils and against a variety of judicial officers, including referees in bankruptcy, clerks, United States magistrates, public defenders, court executives, officers of the Administrative Office of the United States Courts and foremen of juries. We understand that the cases causing the most concern involve judges sued, in their official capacity, by a petitioner or by the United States seeking a writ of mandamus pursuant to Rule 21 of the Federal Rules of Appellate Procedure (FRAP) and 28 U.S.C. § 1651, collaterally attacking the judges' rulings in original actions. See, for example, Colgrove v. Battin, 41 LW 5025 (June 21, 1973), and United States v. Ferguson, 448 F.2d 169 (1971). Your General Counsel, in a memorandum dated February 9, 1973, to the Deputy Director of your Office stated:

"Surely it would be unconscionable to expect judges and courts sued in their official capacities to support the defense by private contributions of the judges. It would be equally unconscionable for a judge to have to rely on the attorney of a private litigant to represent him and to pay the considerable cost of transcription, printing and the attorney's travel involved in an appeal on behalf of the court being sued."

The general question you raise, as stated in your letter, is as follows:

"When a Federal judge or other judicial officer is sued in his official capacity and representation is furnished by private counsel on request, rather than by the Department of Justice (pursuant to 28 U.S.C. 516-519, 547(2)), can the expenses of litigation be paid by the Administrative Office of the United States Courts from the Travel and Miscellaneous Expenses appropriation of the Judiciary Appropriation Act?"

In addition, you ask the following specific questions with respect to the representation of judicial officers:

"(1) If we can apply the Judiciary Appropriations to payment of litigation costs in some cases involving judicial officers, what specific categories of cases are involved?

"(2) In addition to general litigation costs, would it be permissible to pay a minimal fee to an attorney representing a judge, court, judicial officer, judicial council, etc., where gratuitous representation is not otherwise available?

"(3) If the Judiciary Appropriation is not available for payment of costs described in questions 1 and 2 above, is there any other source of payment where services of counsel furnished by the Department of Justice are not available either because of a conflict of interest, or for any other valid reason?

"(4) Would the same answers to the above questions apply to suits against Federal public defenders appointed pursuant to 18 U.S.C. 3006A(h) whom the Department has previously declined to represent because of the inherent conflict of interest involved?"

The general rule is that, in the absence of specific statutory authority for departments and establishments of the government to resort to litigation in the courts in the performance of the duties and responsibilities with which they are charged, it is the duty of the Attorney General, as chief law officer of the government, to institute, prosecute and defend actions in behalf of the United States in matters involving court proceedings and to defray the necessary expenses incident thereto from appropriations of the Department of Justice rather than from appropriations of the administrative office which may be involved in the proceedings. See 44 Comp. Gen. 463 (1965) and 46 id. 98 (1966).

In a letter to you of January 31, 1973, the former Attorney General, Richard G. Kleindienst, set forth the circumstances under which the Department of Justice (Department) will assume the burden of representing judicial officers. First, he stated, the Department will provide representation where the acts which are the basis of the suit are within the scope of the defendant officer's authority and where the only relief sought is money damages against the defendant personally. It is his position, however, that when representation is requested in collateral proceedings which are in the nature of appeals to overturn a decision of the judicial officer rendered in favor of one party or another, and the government is not a party to the litigation, the result of the Department's furnishing representation in such a situation amounts to the Department's defending the position of one or the other private litigants. The former Attorney General further stated that:

"In our view, when no personal relief is sought against the judicial officer, such officer is no more in need of a personal defense than he would be if an appeal were taken from any of his appealable rulings. Nor is there any impropriety in counsel for one of the private litigants representing the judicial officer, as if he were defending an appeal from the officer's ruling."

Accordingly, the Department will not provide representation in such cases. Where a collateral suit against a judicial officer in the nature of an appeal also seeks personal damages against the officer, the Department intends to evaluate the nature of the claim to determine if the money claim is frivolous and make its representation decisions on that basis.

The former Attorney General stated that the Department cannot furnish representation to a judicial officer in a situation where the Department's interests collide with those of the judicial officer, such as in a mandamus action instituted against a judge by the Department. He further stated that the Department could not furnish a special attorney in those cases where it could not on its own represent the judicial officer.

In addition, he stated, however, that the Department will file amicus statements in any type case where it will be helpful to the court to know the government's position or for a relatively impartial statement of what the law is or should be. The former Attorney General stated that whenever the Department furnishes an attorney to represent a judicial officer, it will bear the costs attendant to the representation; however, he concluded that the Department cannot bear the costs of litigation or the fees of private counsel retained by a judicial officer.

We have been informally advised by members of your staff that in those situations, where judicial officers have felt that representation was required, local bar associations were frequently asked to provide attorneys without compensation and that the expenses of such representation, including in some cases attorneys fees, had to be borne by the judicial officers or their attorneys or by the bar associations.

In his memorandum your General Counsel points out that while many of the cases involving the procedure of suing a judicial officer to test collaterally a legal issue arising out of the original litigation are frivolous, some -- such as Colgrove v. Battin, supra., testing the constitutionality and legality of a local rule of court (similar to that adopted by a majority of the Federal district courts) providing for a six-member jury in civil cases -- involve basic and novel issues. Moreover, it is your Office's position that even where the suit is frivolous, some pro forma submission should be made to the court. As we understand it, such a submission is not necessarily required to protect the judicial officer in the Courts of Appeals, since Rule 21 of FRAP provides that the failure of an officer to appear will not result in his losing by default; however, in the absence of an appearance in the Courts of Appeals, the judicial officer is precluded by the applicable rules from appealing an adverse decision to the Supreme Court of the United States. In this connection we suggest your Office may wish to consider proposing a change in the applicable rules which will allow an appeal to the Supreme Court by a judicial officer-defendant without the necessity of an appearance in the Court of Appeals.

In summary, there are numerous cases in which judicial officers are being sued in their official capacities as to which the Department of Justice, for a variety of reasons, has determined that it will, or can, not provide representation. While your Office agrees that many of these suits are frivolous, it has determined that some sort of defense--frequently involving merely a pro forma submission to the Court of Appeals--is necessary in almost every case. Thus, you ask our views as to the availability of appropriations made to the judiciary to pay the costs of making a pro forma appearance in these cases, and of attorneys fees in those cases--which we have been informally advised will be few in number--which will actually require the personal appearance of counsel for the judicial officers where gratuitous representation is not available.

As noted above, under the provisions of 18 U.S.C. 516-519 and except as otherwise authorized by law, the conduct and supervision of litigation in which the United States, an agency or officer thereof is a party is reserved to the Department of Justice under the direction of the Attorney General. Accordingly, whenever a judicial officer, acting in the scope of his official duties, is named as defendant, the Attorney General should be requested to provide representation for such official. (Of course, a request need not be made in those categories of cases--such as those in which the Department of Justice has instituted a mandamus action against a judicial officer--as to which the Attorney General has stated he will not provide such representation.) Also, 5 U.S.C. 3106 contains a restriction on the employment of attorneys or counsel for the conduct of litigation in which the United States, an agency or employee thereof, is a party, but this restriction is directed to the heads of executive and military departments and does not restrict the right of the judiciary to employ attorneys for the conduct of litigation.

It is clear, however, that if we were to hold that the judiciary's appropriations are not available to pay the costs of providing a defense, with respect to a case in which the Attorney General declines for any valid reason to provide representation, such defense, even though it involves defending actions taken by federal employees in the normal course of their business, might have to be borne by the defendants. It is well established that where an officer of the United States is sued because of some official act done in the discharge of an official duty the expense of defending the suit should be borne by the United States. See Konigsberg v. Hunter, 308 F. Supp. 1361 (W.D. Mo., 1970) and 6 Comp. Gen. 214 (1926). Also, we note that under Rule 21 of FRAP judges are entitled, but not required, to appear in court in mandamus and prohibition proceedings (as well as other extraordinary writ proceedings) and it would be burdensome to require that the expenses of such appearances, when made in the best interest of the United States, be borne by the judicial officers involved. Moreover, the present situation involves having the Attorney General, an official of the Executive Branch of the Government, determine whether and to what extent members of institutions of a coordinate branch of the Government, the Judiciary, are to be represented in litigation in which they are named as defendants or respondents.

With these factors in mind, and subject to the qualifications listed below, it is our view that the above cited provisions of law would not preclude the use of judiciary appropriations to pay the costs of litigation including minimal fees to private attorneys--if you determine the use of private attorneys is necessary--in those cases where it is determined that it is in the best interest of the United States and necessary to carry out the purposes of the federal judiciary's appropriations for the judicial officer or body to be defended or represented in that litigation, and the Department of Justice has declined to provide representation. In connection with the matter generally compare 42 Comp. Gen. 595 (1963), in which litigation costs incurred incident to a trial between private parties were authorized to be reimbursed to private attorneys defending a private party where the United States, though not a party in the case had a beneficial interest in its outcome.

Our approval of the payment of litigation costs including minimal attorney's fees where gratuitous representation is not available is subject to two further qualifications. First, your Office should, at the first appropriate opportunity, advise fully the appropriate legislative and appropriations committees of the Congress of your plans and the estimated cost thereof.

Second, we strongly feel that the decision in each case as to the necessity for and the amount of representation required, if any, should be made by someone other than the defendant or respondent (i.e., the judicial officer or entity involved) in that case. In other words, we do not feel that the determination as to whether a defense of a judicial officer's ruling or a judicial body's rule is in the best interest of the United States and necessary to carry out the functions of the judiciary, should be made by the judicial officer or body concerned. Such an independent determination made by your Office would be designed to assure, to the extent possible, that appropriated funds are used only to the extent necessary to protect the judiciary's interest in the outcome of the subject litigation, rather than the judicial officer's personal interest in having his decision upheld, and that such funds are not used, in effect, merely to defend a private litigant's position where, as is the case in most appeals of judicial rulings, the judiciary and the United States have no real interest in the outcome of the appeal.

Much of the same reasoning used above may be applied with respect to Federal public defenders who are appointed pursuant to the Criminal Justice Act, as amended, 18 U.S.C. 3006A(h), who are sued for activities undertaken within the scope of their duties. The Department of Justice has declined to represent these defenders because of the inherent conflict of interest involved. Hence, in the absence of the availability of appropriated funds for their defense, such defense would have to be undertaken, out of the public defender-defendant's own private resources. We understand that it is your intention that the defense of the Public Defenders will be handled for the most part by other public defenders.

Appropriations for the public defender service, under 18 U.S.C. 3006A(h) are available to pay the necessary costs of litigation undertaken by the Public Defender Service. We believe that such appropriations are also available to pay litigation costs (including minimal attorney's fees where other public defenders are not available for such purpose) incurred in defending actions undertaken within the scope of the official duties of public defenders where such defense is considered as necessary for carrying out the purposes of the appropriations and in the best interest of the United States. Nonetheless, as in the case above, we feel that the Congress should be advised of the proposed use of appropriate[d] funds.

Sincerely yours,

(signed)

Elmer B. Staats
Comptroller General
of the United States

One Month CD

Source: Federal Reserve Board

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12/27/2000, 6.59
12/28/2000, 6.51
12/29/2000, 6.50
01/01/2001, ND
01/02/2001, 6.49
01/03/2001, 6.44
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CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, Inc.
15 East 26th Street, Room 906, New York, NY 10010
Tel.: (646) 485-2046, Fax: (212) 696-9545, E-mail: Gideon.Taylor@claimscon.org

96 CV 4849

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U.S. DISTRICT COURT E.D.N.Y.
★ MAR 16 2006 ★
P.M. ______
TIME A.M. ______

TO: Judge Korman
FROM: Gideon Taylor
CC: Judah Gribetz
Burt Neuborne
RE: Swiss Deposited Assets Program Administrative Expenses
DATE: January 31, 2006

In August of 2002, the Claims Conference entered into an agreement, at the request of the Court, which provided for the Claims Conference to assist the Claims Resolution Tribunal ("CRT"), based in Zurich, with technical services.

At the request of the CRT, the Swiss Deposited Assets Program ("SDAP") of the Claims Conference has undertaken work to support the work of the CRT and has been requested by the CRT to continue to do so. At this time, the Claims Conference requests reimbursement from the Court for administrative and other expenses for the period January 1, 2005 through December 31, 2005 and for the first quarter of 2006, as described in the following paragraphs. These sums are the current estimated figures based on the latest data available to date and are subject to year-end closing entries and audit adjustments.

1. 2005 Publication Notice and Outreach

On January 11, 2005, the Court issued an order approving the 2005 Publication Notice and Outreach Budget. The total approved budget was for $1,359,700 (See attached Administration Budget Expense Report for the year ended December 31, 2005), which included $500,000 for the purchase of paid advertisements in newspapers and periodicals. At that same time, the Court ordered the remittance of $500,000 to the Claims Conference to pay for the advertisements. The total expenses for the 2005 Publication Notice and Outreach are $864,406, including the $499,769 for paid ads. The remaining sum was spent on translations of the claim form and instruction packet, printing and distribution of those documents, worldwide call center, multi-language website, and data entry and scanning of the returned claim forms. At this time, the Claims Conference is requesting the reimbursement for administrative expenses relating to this project in the amount of $364,406.

Approved Budget	$1,359,700
Spending	$864,406
Remitted to Date	$500,000
Request for Reimbursement	$364,406

2. 2005 Administrative Expenses Reimbursement Request

On February 23, 2005 the Court approved the 2005 Swiss Deposited Assets Program ("SDAP") administrative budget of $6,081,180. The Claims Conference SDAP Program was assigned tasks by the Claims Resolution Tribunal ("CRT") in Zurich. In 2005, the Swiss Deposited Assets Program ("SDAP") reviewed over 300,000 matches to account owner names and submitted 65 draft awards to the CRT. Additionally, SDAP reviewed all claims identified as Inadmissible by the CRT, submitted 1,252 claims to Court, and coordinated the mailing to claimants. In its Post-Award function, SDAP processed 27 approved batches consisting of 427 Awards and 409 Denials including managing the payment process of $87.1 million to 925 claimants and paid 15 expedited Life Insurance claims, and maintained the CRT II Awards Database.

The total expenses for 2005 SDAP administration is $4,230,096 (See attached Administration Budget Expense Report for the year ended December 31, 2005). As the Court approved the release of $3,000,000 on February 26, 2005, we are now requesting reimbursement for the remaining sum of $1,230,096.

Approved Budget	$6,081,180
Spending	$4,230,096
Remitted to Date	$3,000,000
Request for Reimbursement	$1,230,096

3. 2006 Administrative Budget

For 2006, the CRT has requested the Claims Conference SDAP Program to accomplish a number of tasks. To that end, we have developed the attached budget based on the 2005 budget and aggregating $6,081,180 (See attached SDAP Proposed 2006 Administration Expense Budget for the period January 1, 2006 through December 31, 2006). In accordance with CRT requests, in 2006, SDAP will process 70,000 new matches to account owner names. These new matches are to accounts that have already been awarded by the CRT and are mainly a result of the matching to the 2005 Publication claims. SDAP will also conduct an initial review of approximately 400,000 matches generated by the computer system, which were introduced due to the 2005 Publication. SDAP will also perform data integrity on 37,000 claims, which is the process of proofing the initial data entry of the claimed account owner and family member names and contact information. Further, SDAP will process approximately 14,000 denials to claims that did not match to the Account Holders Database ("AHD"). Finally, SDAP will continue to perform a secondary review of 20,000 new claims, secondary evaluation of 23,000 new names that were added to the computer system, and move towards completion of the secondary review project. The secondary review process analyzes claims to accounts for which bank records do not exist. In this review, SDAP identifies claims that demonstrate a high likelihood of account ownership even in the absence of bank records.

The Claims Conference is requesting approval of the 2006 SDAP Administration budget and transfer of $1,520,295, for operating the SDAP program from January 1 – March, 2006.

Budget Request	$6,081,180
Request for First Installment	$1,520,295

At this time we are respectfully requesting from the Court the transfer of $3,114,797, consisting of $1,230,096 for reimbursement of the 2005 administrative expenses; $364,406 for expenses under the 2005 Publication Notice and Outreach Budget; and $1,520,295 to fund program expenses for the period January 1 through March 31, 2006.

The Claims Conference respectfully further requests that funding for the period April 1 – June 2006 ($1,520,295) and July – September 2006 ($1,520,295) be disbursed to the Claims Conference on April 1, 2006 and July 1, 2006, respectively. A further request will be submitted to the Court for the funding for September 1 – December 31, 2006 at a later time.

We look forward to continuing to assist the Court, Special Masters, and CRT in achieving our common goal.

Should you require further information, I am, as always, available to you.

Respectfully,

Gideon Taylor
Executive Vice President

Attachments

For opinion see 14 Fed.Appx. 132

Briefs and Other Related Documents

United States Court of Appeals,
Second Circuit.
Julia Becker LENINI, et al.; The Estate of Nathan Katz; Abraham Friedman; Eliezer Bloshteyn and Sofiya Bloshteyn, Objectors-Appellants,
v.
Jacob FRIEDMAN, et al., Plaintiffs-Appellees,
and
UNION BANK OF SWITZERLAND, Swiss Bank Corporation, Credit Suisse and Swiss Bankers Association, Defendants-Appellees.
Nos. 00-9217(L), 00-9593 (CON), 00-9595 (CON), 00-9597 (CON), 00-9612 (CON), 00-9613 (CON).
June 15, 2001.

On Appeal from the United States District Court for the Eastern District of New York

Brief of Plaintiffs-Appellees in Response to Appellants Julia Becker Lenini, et al. and the Estate of Nathan Katz

Burt Neuborne, Attorney for Plaintiffs-Appellees, Lead Settlement Counsel, 40 Washington Square South, New York, New York 10012, (212) 998-6172.

Melvyn I. Weiss, Deborah Sturman, Milberg Weiss Bershad, Hynes & Lerach LLP, One Pennsylvania Plaza, New York, New York 10119, (212) 594-5300.

Morris Ratner, Lieff, Cabraser, Heimann & Bernstein, LLP, 274 Battery Street, 30th Floor, San Francisco, CA 94111-3339, (415) 956-5000.

Michael D. Hausfeld, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., 1100 New York Avenue, NW, West Tower, Suite 500, Washington, DC 20005-3934, (202) 408- 4600.

Stephen Whinston, Esq., Berger & Montague, P.C., 1622 Locust Street, Philadelphia, PA 19103.

Robert A. Swift, Kohn, Swift, and Graf, P.C., 1101 Market Street, Suite 2400, Philadelphia, PA 19107, (215) 238-1700.

Note: Page i missing in original document

C. The Intense Effort to Provide Notice to Romani Claimants ... 36

D. The Special Master's Consultation with Romani ... 38

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E. The Adequacy of the Opportunity to Challenge the Special Master's Proposed Plan of Allocation ... 42

III ROMANI APPELLANTS' SUBSTANTIVE OBJECTIONS TO THE PLAN OF ALLOCATION ARE LEGALLY BASELESS ... 45

A. THE GENERAL PRINCIPLES GOVERNING THE PLAN OF ALLOCATION ... 47

B. THE ALLOCATION OF FUNDS TO THE DEPOSITED ASSETS CLASS ... 49

C. THE ALLOCATION OF FUNDS TO THE SLAVE LABOR CLASSES ... 51

D. THE ALLOCATION OF FUNDS TO THE REFUGEE CLASS ... 52

E. THE ALLOCATION OF FUNDS TO THE LOOTED ASSETS CLASS ... 53

PLAINTIFFS-APPELLEES RESPONSE TO THE ESTATE OF NATHAN KATZ ... 60

Introductory Statement ... 60

IV THE DISTRICT COURT WAS EMPOWERED TO APPLY THE CY PRES DOCTRINE IN DISTRIBUTING SETTLEMENT FUNDS TO THE LOOTED ASSETS CLASS ... 63

CONCLUSION ... 69

TABLE OF AUTHORITIES

FEDERAL CASES

In re Agent Orange Product Liability Litig., 818 F.2d 145 (2d Cir. 1987) ... 3, 19, 23, 33, 37, 45

In re Agent Orange Product Liability Litig., 689 F. Supp. 1250 (E.D.N.Y. 1988) ... 59, 66

In re Agent Orange Product Liability Litig., 818 F.2d 179 (2d Cir. 1987) ... 3, 15, 47, 48, 55, 60, 62, 65, 66, 67

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28 U.S.C. § 1332 ... 19

2001 Cong. US HR 1836 ... 12

Introductory Statement

Appellants, claiming to speak on behalf of the Romani community, [FN1] challenge aspects of the order of the District Court, entered on November 22, 2000, approving a plan of allocation and distribution of a $1.25 billion settlement fund established to resolve Holocaust-related litigation against two Swiss bank defendants - UBS and Credit Suisse. [FN2] Invoking principles of abstract justice, but no legal authority, [FN3] appellants insist that a significantly greater proportion of the $1.25 billion Swiss bank settlement fund must be allocated to the many millions of Holocaust victims who suffered looting and loss of life at the hands of the Nazis because, according to appellants, the allocation of the Swiss bank settlement fund must be governed, not by an analysis of the relative strengths or weaknesses of the legal and factual claims leveled against the Swiss bank defendants by varying categories of plaintiffs, but by a moral calculus of the intensity of human suffering and death caused to various categories of victims by the Nazis - regardless of whether that calculus is applicable to the Swiss entities whose behavior is the subject of this litigation.

FN1. A serious threshold question of standing is posed by appellants' claim to speak for Romani Holocaust victims despite the failure of any appellant to have alleged a personal interest in this litigation sufficient to satisfy Article III. *In re Holocaust Victims Assets Litig.*, 225 F.3d 191, 195-97 (2d Cir. 2000). See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-95 (1998); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Allen v. Wright*, 468 U.S. 737 (1984). In addition, this appeal is both jurisdictionally defective and unripe because the order appealed from is not final. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967). The procedural deficiencies requiring dismissal of this appeal are discussed *infra* at Point I.

FN2. The plan of allocation and distribution adopted by the District Court is set forth in a two volume report of the Special Master, Judah Gribetz, Esq., entitled *Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds* (hereafter "the Special Master's Report" or "SMR"), ten copies of which have been lodged with the Court as a part of the Joint Appendix ("JA"). The District Court adopted the Special Master's plan in full on November 22, 2000, after a day-long public hearing at which appellants appeared and presented their objections. The District Court's opinion approving the allocation plan is set forth at JA 12 - 18.
The Special Master's Report is a remarkable achievement. While plaintiffs-appellees submit this brief in support of the Special Master's Report, a careful reading of the Report itself is its own best defense.

FN3. Appellants' 46 page brief fails to cite a single legal authority.

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The short and, in this forum, complete answer to Appellants' challenge to the plan of allocation and distribution adopted below is that the District Court was not empowered to allocate the $1.25 billion Swiss bank settlement fund as a personal exercise in righting Nazi-era wrongs, or as a political exercise in income redistribution, but was obliged to consider the relative strengths and weaknesses of plaintiffs' claims in devising a principled plan for allocating the settlement proceeds of a real-world lawsuit brought by real-world plaintiffs against real-world defendants. Whatever weight appellants' appeal to abstract justice and economic populism might have in other settings, it borders on the frivolous to argue that a Special Master and a District Judge committed legal error in attempting to allocate a $1.25 billion settlement fund in accordance with the relative strengths and weaknesses of the various legal and factual claims of the parties. [FN4] Viewed from the twin perspectives of the relative strength of the plaintiffs' legal and factual claims, and the practical administrability of various approaches to allocation, the plan of allocation and distribution recommended by the Special Master and adopted by the District Court is a model of principled decision-making that cannot possibly be characterized as an abuse of discretion. [FN5]

FN4. This Court has held that an assessment of the strength or weakness of the legal claims involved is a central factor in determining both the fairness of a class action settlement under Rule 23(e), and the propriety of a plan of allocation. See *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164 (S.D.N.Y. 2000), *aff'd*, *D'Amato v. Deutsche Bank*, 236 F3d 78 (2d Cir. 2001) (assessing fairness of settlement); *In re Agent Orange Prod Liab. Litig.*, 818 F.2d 179, 183-84 (2d Cir. 1987) (assessing fairness of allocation of settlement proceeds). See also *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *In re American Bank Note Holographics, Inc., Secs. Litig.*, 127 F. Supp. 2d 418 (S.D.N.Y. 2001); *In re Prudential Secs., Inc., Ltd. P'ship Litig.*, No. MDL 1005, M-21-67, 1995 WL 798907 (S.D.N.Y. Nov. 20, 1995).

FN5. As noted in the SMR, the standard of review in this Circuit of District Court decisions concerning the allocation of a Rule 23 class action settlement fund is abuse of discretion. See SMR, Vol I, Annex B (detailing legal principles governing allocation and distribution of class action settlements), citing *In re Agent Orange*, 818 F.2d 145; 179 (2d Cir. 1987). See also *Handschu v. Special Sers. Div.*, 787 F.2d 828 (2d Cir. 1986); *SEC v. Wang*, 944 F.2d 80 (2d Cir. 1991). The identical standard is widely applied in other Circuits. *In re Chicken Antitrust Litig. American Poultry*, 669 F.2d 228 (5th Cir. 1982); *Wilson v. Wilson*, 46 F.3d 660 (7th Cir. 1995); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000); *Leverso v. Southtrust Bank*, 18 F.3d 1527 (11th Cir. 1994). The Eighth Circuit applies a similarly deferential "clearly erroneous" standard of review. *Nodaway Valley Bank v. Continental Cas. Co.*, 916 F.2d 1362 (8th Cir. 1990).

Statement of the Case

A. *An Overview of the Swiss Bank Litigation*

This appeal arises out of a lawsuit commenced in October 1996, by several sets of

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the plaintiff classes, appellants' political opposition to the settlement does not vest them with Article III standing to pursue an appeal. *In re Holocaust Victims Assets Litig.*, 225 F.3d 191 (2d Cir. 2000). See also *Atlantic Mutual Insurance Co. v. Northwest Airlines*, 24 F.3d 958 (7th Cir. 1994) (denying intervention to group that disagreed politically with court's opinion on status of Taiwan). Nor may self-appointed Romani organizational appellants purport to speak for individual Romani class members in the absence of a showing that members of the organization are actual victims of the alleged wrongdoing that underlies this appeal. *In re Holocaust Victims Assets Litig.*, *supra* at 196 (dismissing organizational plaintiff). See also *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). [FN45] Thus, this appeal must be dismissed for want of Article III standing.

FN45. The danger of allowing self-appointed organizational guardians to purport to speak for individual Romani is demonstrated by the repudiation of appellants' arguments prior to this appeal by significant segments of the Romani community. See letters from Romani leaders to the District Court, reproduced at AA 13-16.

B. The Appeal Does Not Challenge a Final Order of the District Court

Appellants appeal from an order of the District Court, entered on November 22, 2000, adopting the Special Master's proposed plan of allocation, but recognizing that the plan is subject to potential reallocation at the close of the individualized claims process. See JA at 12-24. The Special Master's proposed plan established an elaborate individualized claims program in connection with four of the five plaintiff classes in an effort to return the settlement funds to those individual Holocaust victims who actually suffered the injuries alleged in the complaints. As the Special Master's Report makes clear, however, the "individualized" allocations to the Deposited Assets, Slave Labor I and II, and Refugee classes are not written in stone. At the close of the claims process for each "individualized" class, any unexpended funds will be returned to the District Court for re-allocation among the remaining classes, including reallocation to the Looted Assets Class for *cy pres* distribution. SMR, Vol. I at 19-20.

Thus, appellants' challenge to the amount available to the Looted Assets Class, and to Romani institutions within that class, is clearly premature. Whether viewed as a discretionary exercise in ripeness governed by *Toilet Goods Ass'n v. Gardner*, 387 US. 158 (1967), or a jurisdictionally defective effort to appeal from a non-final order, [FN46] the appeal must be dismissed. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

FN46. Appellants made no effort to secure Rule 54(b) certification.

C. Appellants, Having Acquiesced in a Fair Process for Developing a Plan of Allocation, Are Estopped From Pursuing an Appeal Merely Because They Disagree With the Outcome of That Process

The District Court recognized that although the $1.25 billion Swiss bank settlement fund is substantial, it cannot provide full compensation to the millions of persons who qualify for membership in one or more of the five plaintiff classes. [FN47] The District Court recognized, however, that it would be socially disastrous to pit surviving Holocaust victims against each other at the end of their lives in a formal adversary struggle over the inadequate funds. Accordingly, Judge Korman sought to minimize divisiveness among Holocaust survivors over the allocation of inadequate funds by asking the class members to pre-commit to a fair process for developing an allocation plan, instead of fighting over outcomes. The District Court designed a scrupulously fair procedure for producing a plan of allocation that provided all class members with the three essentials of a fair process: exit, loyalty, and voice. [FN48] The District Court then directed the parties to notify class members of the process to be used in formulating a plan of allocation, and permitted persons who opposed the process to opt out. The class overwhelmingly endorsed the proposed procedure, with fewer than 300 persons electing to opt out, and approximately 580,000 positive responses to date.

FN47. Judge Korman discussed the "fairness" of the $1.25 billion settlement figure in his opinion upholding the settlement under Rule 23(e). The opinion is reported at *In re Holocaust Victims Assets Litig.*, 105 F.Supp. 2d 139 (E.D.N.Y. 2000), and is set forth in SMR Vol. I, Exhibit 2 to the plan of allocation.

FN48. See Declaration of Burt Neuborne in Support of Settlement's Fairness, set forth at JA 645-667.

The thoughtful, non-adversarial approach adopted by Judge Korman has made it possible to discuss allocation vigorously with a remarkable absence of rancor. The Court's effort to avoid driving an unnecessary wedge between categories of Holocaust survivors would be seriously eroded, however, if a class member, after having pre-committed to a fair process for developing an allocation plan, is permitted to repudiate his or her pre-commitment to the process by challenging the outcome of that process on appeal. Accordingly, having acquiesced in the scrupulously fair process by which the plan of allocation was adopted, [FN49] appellants may not be permitted to repudiate their agreement merely because they are unhappy with the outcome. See *Agent Orange*, 818 F.2d 145, 170 (2d Cir. 1987) (upholding post-notice plan of allocation developed by Special Master). See also *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 223-24 (5th Cir. 1981), cert. denied, 456 U.S. 998 (1982).

FN49. The procedural fairness of the allocation process is discussed *infra* at Point II.

II
APPELLANTS HAVE BEEN TREATED WITH SCRUPULOUS PROCEDURAL FAIRNESS

A. The Decision to Open the Settlement Fund to Romani

All agree that Romani holders of Swiss bank accounts, Romani slave laborers, Romani refugees, and Romani victims of looting should participate in the Swiss settlement fund on an equal footing with other similarly situated victims of Nazi persecution, not because the Romani people are owed special consideration, but

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because Romani victims suffered indistinguishably from other victims of Nazi persecution and, therefore, deserve to be treated equally in seeking relief from the Swiss bank settlement fund. [FN50]

FN50. The decision to open the settlement fund to Jehovah's Witnesses, Romani, homosexuals, and the disabled is briefly described in *In re Holocaust Victims Assets Litig., supra,* 225 F.3d at 199-203.

B. The Appointment of Additional Settlement Counsel to Represent the Interests of Romani

Although the District Court found that the presence of key settlement counsel serving without fee and the appointment of a neutral Special Master made it unnecessary to appoint separate counsel for each plaintiff class, [FN51] the District Court appointed a separate settlement counsel for the Romani to assure that the interests of the Romani were adequately represented. Even before upholding the settlement agreement as fair, Judge Korman, with the unanimous support of settlement counsel, appointed Barry Fisher, Esq., as an additional settlement counsel with special responsibility to assure that the interests of the Romani were adequately represented during the allocation and distribution process. [FN52] Mr. Fisher, a long-time advocate for the Romani, has vigorously and responsibly represented the interests of the Romani. Mr. Fisher submitted a plan of allocation to the Special Master seeking to allocate 10% of the settlement fund for the benefit of the Romani. See SMR, Vol. I, Annex A, p. A-32. Mr. Fisher, along with two other lawyers deeply involved in Romani issues, Mr. Sebastian Rainone and Mr. Martin Mendelsohn, endorsed the decision to vest the International Organization for Migration (IOM), headquartered in Geneva, with responsibility for administering funds allocated to needy Romani Holocaust survivors because no Romani institution appeared to exist that commanded the confidence of the entire Romani community. [FN53] See JA at 1075-77. Finally, although Mr. Fisher is committed to the goal of assuring adequate funding of institutions designed to aid the Romani community, Mr. Fisher does not support appellants' challenge to the District Court's order, recognizing that the time for consideration of substantial allocations to Romani institutions must await completion of the effort to distribute funds to individual claimants. See letter from Barry Fisher at AA 12.

FN51. See Fairness Opinion, SMR, Vol. I, Exhibit 2; Neuborne Declaration, JA at 645-67. The District Court found that separate legal representation of the five victim classes was neither advisable nor required by *Amchem Prods. v. Windsor,* 521 U.S. 591 (1997), or *Ortiz v. Fiberboard,* 527 U.S. 815 (1999). SMR, Vol. I, Exhibit 2 (Fairness Opinion). Since key settlement counsel were working without fee, the District Court found that *pro bono* settlement counsel were capable of presenting conflict-free information and legal analysis to the Special Master concerning each class without the highly inadvisable step of pitting categories of elderly Holocaust victims against each other. In the opinion of persons who work closely with Holocaust survivors, it would have been psychologically harmful to force elderly Holocaust survivors to denigrate the suffering of other victims. As noted, no challenges are pending to Judge Korman's "fairness" decision, including his thoughtful decision to forego adversary representation of each class of

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Holocaust victims.

FN52. Mr. Fisher requested to be appointed as a settlement counsel on July 23, 1999. Judge Korman immediately granted his application.

FN53. It has been impossible to fill the seat allocated to the Romani on the Board of Trustees of the German Foundation because divisions within the Romani community have blocked the emergence of a candidate with sufficient support. In the absence of a Romani institution, the German Foundation has also turned to the IOM to administer funds allocated to Romani recipients.

C. The Intense Effort to Provide Notice to Romani Claimants [FN54]

FN54. Appellants' challenge to the notice program is not timely. Chief Judge Korman upheld the notice program, including its application to the Romani, in his July 26, 2000 decision upholding the settlement's fairness. The time to appeal from that order has long since expired.

The parties undertook a massive, worldwide notice program of virtually unprecedented intensity designed to inform potential claimants of the $1.25 billion settlement, and of the procedures to be utilized in developing a final plan of allocation and distribution. The elaborate Notice Plan, adopted by the District Court on May 10, 1999, is briefly summarized at SMR, Vol. I, pp. 86- 87. The complete Notice Plan is set forth at JA 215 - 401.

In keeping with the careful effort to treat the Romani with procedural fairness, the Notice Plan contained a specific set of provisions aimed at providing notice to Romani. AA at 17-217. A notice administrator, Kathy Kinsella, was charged exclusively to administer a Roma Outreach Program. She traveled throughout Europe to assure maximum notice to the Romani. See Ms. Kinsella's report in the Supplemental Appendix. [FN55] AA at 17-217.

FN55. The Supplemental Appendix also contains excerpts (pp. 112-21) from the transcript of the allocation hearing on November 20, 2000, at which time Judge Korman explicitly addressed issues of fairness to the Romani.

The success of the Notice Plan is demonstrated by the extraordinary response that it elicited. As of August 30, 2000, approximately 562,000 questionnaires from around the world [FN56] had been returned by potential claimants, including 23,394 questionnaires from self-identified Romani. [FN57] While appellants quibble with the Notice Plan, arguing that only Romani can give effective notice to other Romani, the significant response to the notice plan by the Romani makes it clear the notice plan was remarkably effective in reaching their community. In fact, the notice plan adopted by the District Court is considerably more ambitious than the plan deemed adequate by this Court in *Agent Orange*, 818 F.2d at 167-70 (approving notice, and taking judicial notice of widespread news reporting of settlement).

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01-9193(L), 01-9229(CON)

United States Court of Appeals
for the
Second Circuit

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UNITED STATES COURT OF APPEALS
FILED
FEB 28 2002
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

IN RE: AUSTRIAN AND GERMAN BANK HOLOCAUST LITIGATION

WALTER STEVEN ZEISL and BURT NEUBORNE,

Plaintiffs-Appellants,

GERARD HAAS, CHARLOTTE HAAS SCHUELLER, GABRIELE HAMMERSTEIN, HELEN NIGHTENGALE, ALICE NIGHTENGALE LUHAN and SIMON BRONNER,

Consolidated Plaintiffs,

– against –

HAROLD WATMAN, on behalf of himself and all other persons similarly situated, RUTH ABRAHAM, on behalf of herself and all other persons similarly situated, MICHAL SCHONBERGER, on behalf of himself and all other persons similarly situated, RUDOLFINE SCHLINGER and ERNESTINE SCHWARZ WASYL,

Plaintiffs-Appellees,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF BURT NEUBORNE

BURT NEUBORNE
Attorney for Appellant
40 Washington Square South
New York, New York 10012
(212) 998-6172

Judge Kram vigorously resisted the applications, retaining David Boies to represent her personally in the Second Circuit, and directing court-appointed counsel, Lawrence Byrne, to appear in the proceeding to protect the rights of holders of the Austrian assignment. JA 0565. On May 17, 2000, the Second Circuit issued a writ of mandamus directing dismissal of the German bank cases, holding that, pursuant to the doctrine of separation of powers, the District Court lacked power to seek to interfere with the activities of the German Foundation. In re Austrian and German Bank Holocaust Litigation (Duveen), 250 F.3d 156 (2d Cir. 2001). JA 0666. On May 18, 2001, Judge Kram entered an order unconditionally dismissing the German bank cases. JA 0673. On May 21, 2001, Judge Kram abandoned the effort to appoint special counsel to enforce the Austrian assignment, noting that the Austrian Ambassador to the United States had expressed doubt over the legal viability of the underlying claims, and that the action of the German Foundation in opening its property compensation fund to Austrian bank claimants had conferred a significant benefit on the Austrian bank settlement class. JA 0680-0688.[26] On May 30, 2001, the German Bundestag announced the achievement of legal peace, paving the way for the speedy transfer of German industry's $5 billion commitment to the Foundation.[27] Distribution of the Foundation's assets to Holocaust victims began virtually immediately. Between June, 2001-January, 2002, the German Foundation distributed more than 2.5 billion DM in connection with payments to 600,000 Holocaust victims.

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[26] Judge Kram codified her refusal to permit voluntary dismissal of the German bank cases in two opinions, dated March 7, 2001 and March 20, 2001, respectively. Each opinion is premised on the erroneous assumption that the Austrian assignment claims are legally enforceable, and that the Austrian bank class received no benefit from the German Foundation. On May 21, 2001, Judge Kram retracted her March concerns, granting leave to her court-

On June 14, 2001, once payments to victims had been commenced by the Foundation, the arbitrators announced an award of approximately 124 million DM pursuant to the June, 2000 international arbitration agreement.[28] JA 0693; 0695. On June 21, 2001, the Board of Trustees of the German Foundation (with

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appointed counsel to dismiss the effort to enforce the Austrian assignment because the Austrian Ambassador had indicated the legal vulnerability of the claims, and the German Foundation had granted equal access to Austrian bank claimants to the German property fund. JA 0680-88. As far as Zeisl's brief is concerned, Judge Kram's May 21, 2001 about-face never took place.

[27] German industry has competed the transfer to the Foundation of virtually its entire 5 billion DM financial obligation, plus a 100 million DM interest payment. Disagreement exists concerning the obligation of German industry to pay interest of approximately 60-70 million DM on the deferred payment during the period of unforeseen delay occasioned by Judge Kram's refusal to dismiss the German bank cases. Disagreement also exists over payments of approximately 63 million DM to the International Commission on Holocaust Era Insurance Claims (ICHEIC), for which certain German insurance companies claim a credit. The disagreements are currently the subject of negotiations. See JA 1511.

[28] Neuborne, who had appeared pro bono in both the Swiss bank litigation and the German slave labor cases, initially declined to submit an application for fees in connection with his work in establishing the German Foundation. When colleagues pointed out that under the unique floor/ceiling nature of the arbitration agreement, an award would have a minimal impact on funds available to Holocaust victims, Neuborne filed a fee application.